

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Reallocation of Television Channels) ET Docket No. 97-157
60-69, the 746-806 MHz Band)

To: The Commission

JOINT PETITION FOR RECONSIDERATION OF
LINDSAY TELEVISION, INC. AND
ACHERNAR BROADCASTING COMPANY

1. Achernar Broadcasting Company (Achernar) and Lindsay Television, Inc. (Lindsay) are mutually exclusive applicants for a new UHF television station on Channel 64 in Charlottesville, Virginia. After 12 years of litigation involving the Radio Astronomy Quiet Zone, the parties, including the National Radio Astronomy Observatory (NRAO), the Quiet Zone protagonist, have finally resolved their differences: Amendments reflecting a new transmitter site and technical proposal were filed in December 1997 and in January 1998 the applicants entered into an agreement to merge their interests, contingent only upon grant of the construction permit for Channel 64. Unfortunately, the *Report and Order* in ET Docket No. 97-157, FCC 97-421, released January 6, 1998, threatens to preclude such a grant, leaving Achernar and Lindsay with no

channel allocation and the NRAO without the protection for which it bargained pursuant to the Commission's Quiet Zone Rule.

2. In its ET Docket 97-157 *Report and Order*, the Commission designated Channels 63, 64, 68 and 69 as public safety channels but permitted the existing UHF analog licensees and permittees to continue operation on those channels until the conclusion of the DTV transition period. Paras. 21, 35-36. However, pending applications and applications filed subject to the "freeze" for those channels were ordered held in abeyance until some time after the conclusion of both the DTV and broadcast auction proceedings (MM Docket No. 97-234; GC Docket No. 92-52; and Gen. Docket No. 90-264). Para. 40. Achernar and Lindsay seek reconsideration of that portion of the *Report and Order* which holds pending applications for the designated public service channels in abeyance for the indefinite future.^{1/} Petitioners contend that such action is not required by the statute; not necessary to the statutory purpose; not supported by the facts relied upon; not consistent with the actions taken regarding existing licensees and permittees; and contrary to the

^{1/} The petitioners recognize that applications not accepted for filing because of the "freeze" may present different and more complicated questions and will take no position on that matter.

public's need for and interest in new off the air television outlets.

3. Achernar and Lindsay do not challenge the need for additional public safety spectrum space.^{2/} Rather, Lindsay and Achernar challenge the assumptions that exclusive public safety usage is statutorily required and that grant of the pending applications for those channels poses more of a potential impediment to the public safety service than do the licensees and permittees already authorized on those four channels.^{3/} The Commission's decision to exclude pending applications for the channels in issue is virtually unexplained in the *Report and Order*, relying upon the conclusionary statement that "we believe it is important to maximize the utility of the

2/ In this Petition, we assume the allocation of Channels 63, 64, 68 and 69 for such new service. However, for reasons stated in the comments of the Association for Maximum Service Television, Inc. and the National Association of Broadcasters, filed September 15, 1997, we ask the Commission to reconsider and allocate the block of channels 66 through 69 for such new service.

3/ Thirty stations are presently licensed on the four channels in question: 5 on Channel 63; 9 on Channel 64; 10 on Channel 68; and 6 on Channel 69. Of those 30 stations, 4 are educational stations. Six construction permits for the four channels are presently outstanding; 2 on Channel 63; 1 on Channel 64; and 3 on Channel 68. *Notice of Proposed Rulemaking*, ET Docket No. 97-157, 62 Fed. Reg. 41012, Appendix (1997).

746-804 MHz band for public safety and new commercial services." Para. 40.4/

4. The statutory impetus for allocation of additional public safety spectrum space is Section 337 of the Act, adopted as part of the Balanced Budget Act of 1997. However, while the Act requires the Commission to allocate 24 megahertz of spectrum in the 746-806 MHz (Channel 60-69) band, it does not require the Commission to dismiss or place in limbo preexisting applications for the chosen channels. To the contrary, the Congress' intent was demonstrably that public safety use and standard television stations should coexist on the frequencies, protecting each other from mutual interference. The Conference Report accompanying the Balanced Budget Act of 1997, wherein Section 337 was adopted, makes clear the fact that the Congress contemplated issuance of new commercial licenses in the public safety spectrum:

The conferees expect that, for the period during the transition, the Commission will ensure that full-power digital and analog licensees will operate free of interference from public safety service licensees, and conversely, that public safety service licensees will operate free of interference from analog and digital television licensees. The conferees also expect that the Commission will

4/ Notwithstanding the pending petitions for reconsideration in the DTV rulemaking proceeding (MM Docket No. 87-268), the *Report and Order* assumes that no DTV channels will be allocated or available to new standard television service operators. Para. 40.

ensure that public safety service licensees continue to operate free of interference **from any new commercial licensees.**

H.R. Conf. Rep. No. 105-17, 105th Cong., 1st Sess. 580 (1997), reprinted in September 1997 U.S.C.C.A.N. 176, 200 (emphasis added).

5. The facts provide no more rational basis for the action taken than does the statute. On the public safety designated channels there are 30 licensed stations; their presence until the end of the DTV transition is deemed compatible with new public safety service usage. Ironically, those stations include significant metropolitan areas where the need for public safety spectrum is said to be most acute, *Notice of Proposed Rulemaking, supra*, at para. 22, e.g., Channel 64-- WSTR-TV, Cincinnati, Ohio; WLLA, Kalamazoo, Michigan; WNAC-TV, Providence, Rhode Island. Channel 68-- WABM, Birmingham, Alabama; WABU, Boston, Massachusetts; WHSE-TV, Newark, New Jersey. Channel 69-- WYHS-TV, Hollywood (Miami area), Florida; KSWB-TV, San Diego, California; WTBU, Indianapolis, Indiana. Similarly, the six holders of construction permits will be permitted to construct new analog facilities, presumably without infringing on the public safety use.^{5/} Here again, the permittees will serve

^{5/} In paragraph 35 of the *Report and Order, supra*, the Commission provides construction permit holders an additional three years to complete construction. That,

communities which are not insignificant, e.g., Sumter (Columbia area), South Carolina; Boca Raton, Florida; Scranton, Pennsylvania; and Arlington (Dallas area), Texas.

6. Against this background it is difficult to discern why grants in the four locations which have non-frozen pending applications for Channels 63, 64, 68 and 69 should be summarily excluded from equal treatment. The four locations-- Tulsa, Oklahoma (educational); Charlottesville, Virginia; Destin, Florida; and Des Moines, Iowa-- have not demonstrated any unique pressing public safety need. In fact, the Channel 64 applicants for Destin, Florida and Charlottesville, Virginia represent only the first and second local transmission outlets for their communities.^{6/} Depriving these rural communities of service serves no discernible public interest.

7. The Commission's Notice emphasized that "it is our purpose to accommodate as broad a range of services

the Commission holds, "provides a date certain for planning purposes for public safety agencies"

6/ Achernar and Lindsay, the Charlottesville applicants, have entered into a settlement agreement which was filed on January 30, 1998, and are prepared to construct well within the 36 month period the Commission considers sufficient time for public safety agency planning purposes, *Report and Order, supra*, at para. 35.

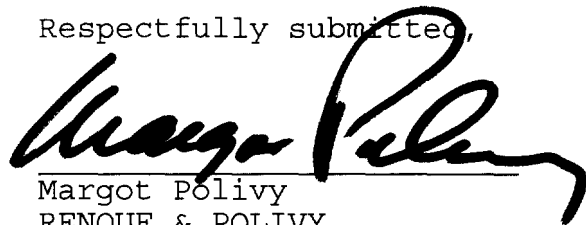
as technically feasible . . ." (para. 15) and appeared to assume that pending applications would be permitted to operate on the same basis as already authorized facilities, (App. C-4). However, the *Report and Order* abandons that expansive policy for no explained reason. In opting to foreclose pending applicants, the Commission has unnecessarily placed the mandates of Section 309(g), to encourage the larger and more effective use of radio, 47 U.S.C. § 303(g), and Section 309(l), to expedite the resolution of long pending comparative cases, 47 U.S.C. § 309(l), in conflict with the mandate of Section 337 to allocate more public safety spectrum.

8. While the Commission's discretion in rulemaking proceedings is broad, it is not unfettered. The Commission's policy goals for public safety spectrum are achievable without effectively dismissing valid standard television applications already accepted for filing. Such an action, while superficially efficient, is over broad, arbitrary and contrary to the public interest. Agencies such as the Commission are mandated to consider the kind of "reasonable alternative" shared use would here provide. See *Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 51 (1983); *Action for Children's Television v.*

F.C.C., 821 F.2d 741, 745-747 (D.C. Cir. 1987); *Office of Communication, United Church of Christ v. F.C.C.*, 779 F.2d 702, 714 (D.C. Cir. 1985).

9. In view of the foregoing, Achernar and Lindsay urge the Commission to reconsider that portion of the *Report and Order* which precludes the grant of pending UHF television applications for Channels 63, 64, 68 and 69. Such modest modification of the *Report and Order* would permit Charlottesville, Virginia its second local television outlet without impeding public safety usage of the newly allocated spectrum. Reconsideration serves the public interest in all respects and avoids the needless public and private delay and cost which are the inevitable result of any policy excluding non-frozen pending applications.

Respectfully submitted,



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